No. 21139

United States
COURT OF APPEALS
for the Ninth Circuit

RELIANCE NATIONAL LIFE INSURANCE COMPANY,

Appellant,

v.

MARGARET HACKELMAN,

Appellee.

REPLY BRIEF OF APPELLANT

FILED

DEC 1 1966

WM. B. LUCK, CLERK

CAKE, JAUREGUY, HARDY, BUTTLER & McEWEN,
JOHN R. FAUST, JR.,
1408 Standard Plaza, Portland, Oregon,
Attorneys for Appellant.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 11-66

INDEX

TABLE OF CASES

No. 21139

United States

COURT OF APPEALS

for the Ninth Circuit

RELIANCE NATIONAL LIFE INSURANCE COMPANY,

Appellant,

v.

MARGARET HACKELMAN,

Appellee.

REPLY BRIEF OF APPELLANT

ARGUMENT

Medak v. *Hekemian*, 241 Or. 38, 404 P.2d 303 (1965), cited by Appellee, does not reverse the well-established rule in Oregon that evidence of fraud must be "clear and convincing" and "of a high degree of cogency" (see cases cited Appellant's Br. 5-6, Appellee's Br. 3-4). The appellants in *Medak* did not object to the court's instruction that fraud must be proved by clear, convincing and satisfactory evidence; they objected only to the instruction that an *estoppel* must be so proved, and so the propriety of the instruction

as to fraud was not an issue on appeal, and was not commented upon by the court.

In the instant case, the fact of primary importance remains: There was no evidence whatsoever that Appellee was told she was acquiring a proprietary interest in the Appellant company.

The testimony of Appellant's agent Burchfield excerpted on page 4 of Appellee's Br. is hardly an admission that he misled Appellee, particularly when read in context:

> "Q. Did you tell her that she was investing money in your company?
>
> A. Yes.
>
> Q. You did tell her that?
>
> A. Yes.
>
> Q. But she wasn't investing money in your company, was she?
>
> A. The —
>
> MR. McEWEN: The contracts are in evidence, your Honor. I think that is —
>
> THE COURT: Well, no. Let's get his understanding.
>
> Q. (By Mr. Morrell): She was paying the first year's premium on the policy?
>
> A. Yes. A life insurance policy, yes.
>
> Q. Yes. And this was not an investment, was it?
>
> A. Not in the sense that you would invest in stocks or bonds or building, no. *It was investing in a life insurance policy.*
>
> Q. But you told her that she was investing in your company?

> A. *In a life insurance policy* represented by Reliance National Life Insurance of Salt Lake City, Utah." (Tr. 68).

Burchfield told Appellee she was investing in life insurance, and in truth she was. As quoted in Appellee's Brief, she expected that "we were to get investments and this life insurance with it" (Tr. 9), and this accurately describes just what Appellee got: Appellee's Brief makes no attempt whatsoever to meet Appellant's arguments and authorities to the effect that *this policy, which provided for annuities, for an accumulating cash surrender value and for dividends based on the company's earnings, can fairly and reasonably be characterized as both insurance and an investment.* (See Appellant's Br. 7-9).

Appellee and the lower court emphasize the caption of Appellant's policy: "Estate Accumulator Contract." While this may be a rather fancy caption for a life insurance policy (but no fancier than many others in use), *this caption in no way suggests a proprietary interest in the company,* which Appellee alleges to have been promised, and the briefest glance at the policy makes plain its substance (see the plain references in the opening page of Def. Exs. 12-14- to "Policy Number," "Insured," "AMOUNT OF INSURANCE," "First ANNUAL Premium," "PREMIUM TABLE," etc.).

Appellee's Brief also makes no comment on the many dealings between Appellee and Appellant which must have made the nature of her purchase abundantly clear to her (see Appellant's Br. 9-10).

The opportunity of the trial judge to view the witnesses is not significant here, because Appellee does not argue that Appellant's agent's testimony is untruthful (to the contrary, Appellee quotes him), and Appellant does not contend that Appellee's testimony is untruthful in any respect. The significant aspect of the testimony is not what the lower court heard, but what it did *not* hear: Never did Appellee or anyone else testify that she was told she would receive a proprietary interest in the company, and nothing given her by Appellant even suggests such a promise. Her present allegation that she was to have a proprietary interest has no basis in the record other than her vague recollection of the use of the word "investment," a term which, used in connection with a policy of this nature, was hardly fraud.

CONCLUSION

Appellee obviously has "buyer's remorse," probably inspired by the efforts of Appellant's competitors (see Appellant's Br. 11), but she does not have a cause of action for fraud. The judgment should be reversed.

Respectfully submitted,

JOHN R. FAUST, JR.
CAKE, JAUREGUY, HARDY, BUTTLER
& MCEWEN
Attorneys for Appellant

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

John R. Faust, Jr.
Of Attorneys for Appellant